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WOMEN'S PENSION REFORM: CONGRESS INCHES TOWARD EQUITY

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In the workplace and in the home, women suffer economic injustices. The inequities of our private and governmental pension systems compound their financial problems, leading to inadequate retirement income for many older women. For example, only ten percent of women age sixty-five and over received private pensions or annuities in 1982, as compared to twenty-nine percent of men age sixty-five and over.[1] Women receiving pensions likewise get much less than men, averaging $1,520 in 1982.[2] The average for men in 1982 was $2,980.[3]

Gradually, policymakers are recognizing the shortcomings of pension systems. In the past few years, federal legislation has greatly expanded women's pension rights. As this Article argues, however, much remains to be done. Part I of the Article discusses recent pension legislation. Part II discusses possibilities for future legislation.

I. Recent Pension Legislation

This Section describes recent pension legislation applicable to homemakers and women workers.

A. *Homemakers*

Nearly all pension improvements for women enacted in the last few years affect homemakers' rights.[4] Many widows and di-

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1. U.S. Dep't of Health and Human Servs., Income of the Population 55 and Over, 1982 11 (Table 5) (1984) [hereinafter cited as Income of the Population].

2. *Id.* at 59 (Table 33). Figures for private pension or annuity recipients age 65 and over.

3. *Id.*

4. All legislation referred to in this Article is gender-neutral, but will be discussed in

vorced women discovered that their right to share in a husband's pension expired with the end of the marriage. Women's advocacy groups urged Congress to support new homemaker protections because they view marriage as an economic partnership: both husband *and* wife help earn the pension. The idea is that, regardless of her marital status at retirement, a homemaker should be able to count on receiving a pension. Members of Congress have, at the very least, recognized the importance of the pension for an older woman's survival. Without a pension, she must rely on social security or savings, which are usually minimal.[5]

The five following examples represent highlights of recent retirement income legislation for women:

1. *Foreign Service and Central Intelligence Agency retirement systems*— The Foreign Service Act of 1980[6] provides for an automatic division of retirement and survivor benefits when a couple divorces. A court is free to award a former spouse any or no portion of the Foreign Service officer's benefits. If the court does not address the issue and the couple makes no arrangement in their property settlement, the law provides that the former spouse, married at least ten years, receives fifty percent of that part of the monthly retirement annuity accumulated during the marriage, plus a proportionate share of the survivor annuity.[7] The law also contains a provision requiring the employee to obtain his wife's written consent before waiving her right to a widow's pension.[8]

Congress passed a similar law in 1982 covering former spouses of certain Central Intelligence Agency employees.[9] Although these two pieces of legislation affect only a few thousand people, they are noteworthy both because they provide for divorced spouses even if a court fails to address the pension issue and because they furnish a specific formula for pension division.

2. *Railroad retirement and social security*— In 1981, Congress passed legislation giving a divorced spouse, married at least ten years, the right to collect a railroad retirement benefit

terms of its effect on women.

5. Over three-fourths of all non-married women age 65 and over who receive social security depend on it for at least half their income. Income of the Population, *supra* note 1, at 69 (Table 40).

6. Pub. L. No. 96-465, 94 Stat. 2074 (1980) (codified as amended at 22 U.S.C. §§ 3901-4226 (1982)).

7. 22 U.S.C. § 4054 (1982).

8. *Id.* § 4046(b)(1)(B).

9. Pub. L. No. 97-269, §§ 601-613, 96 Stat. 1142, 1145-55 (1982).

based on Tier I of the retiree's pension.[10] Tier I is that portion of the railroad retirement benefit equivalent to a social security benefit.[11] The former wife may apply for her benefit as early as age sixty-two, or age sixty if her ex-husband has died.[12] The railroad retiree need not relinquish any part of his Tier I benefit, because the former spouse's benefit is paid in addition to it. This law partially overruled the United States Supreme Court's 1979 decision in *Hisquierdo v. Hisquierdo*.[13] The Court stated that the federal Railroad Retirement Act[14] expressly intended the pension for the retiree only and, therefore, preempted California's domestic relations law. California law had classified railroad retirement benefits acquired during marriage as community property.

Additional legislation in 1983 gave courts the right to treat the remainder of the retiree's railroad pension, the non-Tier I portion, as marital property.[15] A court may order the Railroad Retirement Board to pay the former spouse a specific part of the retiree's benefit.[16]

Recent improvements in social security benefits for homemakers include allowing a divorced wife to start collecting her benefit as soon as the "wage earner" has reached sixty-two, regardless of whether he has already retired and applied for his own benefit.[17] Other so-called dependents, such as a current wife or child, still may not apply for benefits until the worker does so.

3. *Military retirement*— In *McCarty v. McCarty*,[18] a case similar to *Hisquierdo*, the Supreme Court declared that because of preemption by federal law, military retired pay could not be considered community property. Women's groups pressed hard for corrective legislation, and in 1982 obtained passage of the

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10. The Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §§ 1116-1129, 95 Stat. 357, 628-43.

11. 45 U.S.C. § 231b(a)(1) (1982).

12. *Id.* § 231a(c).

13. 439 U.S. 572 (1979). *See* 45 U.S.C. § 231d(c)(3) (1982).

14. 45 U.S.C. §§ 231-231u (1982).

15. The Railroad Retirement Solvency Act of 1983, Pub. L. No. 98-76, § 419, 97 Stat. 411, 438 (amending 45 U.S.C. § 231m (1982)).

16. *Id.*

17. Social Security Amendments of 1983, Pub. L. No. 98-21, § 132, 97 Stat. 65, 93-94 (to be codified at 42 U.S.C. § 402). A divorced wife is eligible to collect a social security benefit based on her former husband's earnings if (1) she is age 62, (2) the marriage lasted at least ten years, and (3) her former husband worked in social security-covered employment long enough to earn the right to a benefit. If the former husband is not yet collecting social security benefits, she may still apply for benefits for herself, but only if the husband is at least age 62 and the couple has been divorced for at least two years. *Id.*

18. 453 U.S. 210 (1981).

Uniformed Services Former Spouses' Protection Act.[19] The Act permits courts to award or couples to negotiate a share of the military retired pay for the former wife. If the marriage lasted ten years or longer, a court can order the military to pay the former spouse her pension share directly.[20]

The same 1982 law allows a military retiree to voluntarily name the former spouse to receive a survivor's benefit.[21] Subsequent legislation has strengthened this survivor protection for the divorced wife.[22]

4. *Federal civil service retirement*— In 1978, Congress clarified that courts had the right to divide civil service benefits at divorce.[23] Until recently, however, federal law excluded the former spouse from receiving a widow's pension,[24] notwithstanding any domestic relations court order. The Civil Service Retirement Spouse Equity Act of 1984 allows a court to award, or couples to negotiate, survivor protection for a former spouse.[25] The most progressive feature of this law is its "retroactive" provision, rarely seen in federal pension reform legislation. Spouses whose former husbands retired before the law's effective date of May 7, 1985, and who meet certain criteria, may receive a survivor annuity. They need only file an application with the United States Office of Personnel Management.[26] The new law also requires a federal worker to obtain a spouse's written consent to waive her right to a widow's pension.[27]

5. *Private pensions*— Through the Retirement Equity Act of

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19. Pub. L. No. 97-252, title X, 96 Stat. 718, 730-38 (1982) (codified in scattered sections of 10 U.S.C.).

20. 10 U.S.C. § 1408(d) (1982).

21. *Id.* §§ 1447, 1448.

22. The Department of Defense Authorization Act, 1984, Pub. L. No. 98-94, § 941, 97 Stat. 614, 652-54 (amending 10 U.S.C. §§ 1448, 1450 (1982)) clarifies and expands the right of former spouses to receive widows' pensions. The Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, § 644, 98 Stat. 254 (to be codified in scattered sections of 10 U.S.C.) allows the former spouse to obtain widow's pension protection in situations in which her former husband does not carry out his written agreement to elect the protection.

23. Pub. L. No. 95-366, 92 Stat. 600 (1978) (codified at 5 U.S.C. § 8345(j) (1982)).

24. 5 U.S.C. § 8341(a)(1) (1982) (amended 1984).

25. Pub. L. No. 98-615, 98 Stat. 3195 (amending 5 U.S.C. §§ 8331-8348) (1982).

26. *Id.* § 4, 98 Stat. at 3205 (amending 5 U.S.C. § 8341 (1982)). The criteria are: (1) the divorce must have occurred after September 14, 1978 but before May 9, 1987; (2) the former husband must have retired before May 7, 1985; (3) the former wife must have been married to the federal employee for at least ten years of his government service; (4) she must not be entitled to another pension based on her own or her former husband's employment; (5) she must not have remarried before age 55; (6) she must file an application before May 9, 1987; and (7) she must be at least 50 years of age at the time of filing.

27. *Id.* § 2(3), 98 Stat. at 3195 (amending 5 U.S.C. § 8339(j)(1) (1982)).

1984 (REA),[28] Congress addressed pension inequities affecting homemakers whose husbands had worked under company and union pension plans. The most dramatic of these inequities were pension provisions that denied benefits to widows whose husbands died "too soon." The Employee Retirement Income Security Act of 1974 (ERISA),[29] which governs private pension plans, had provided survivor pension protection for spouses whose husbands died after reaching retirement age. No protections were required, however, when workers died before that age. Under the typical plan, this meant that a worker would not be given the joint-and-survivor option before age fifty-five, even if he had been employed for as many as twenty-five or thirty years under the plan. Once he reached age fifty-five, the choice to accept survivor protection belonged to the worker alone.[30]

REA requires that once a worker becomes vested under the plan—that is, has earned the right to receive a pension at retirement—then the plan must automatically offer survivor protection.[31] The cost of providing the survivor protection may be charged to the married worker who accepts the protection, in the form of a reduction in the future pension benefit.[32] A worker who does not want the survivor protection and the reduction in his own pension may decline the protection only with the written consent of the spouse.[33]

Divorced spouses likewise receive new protection under REA. A spouse who has been awarded a share of the worker's pension at the time of divorce may collect her share directly from the pension plan, if the court issues what REA calls a "qualified domestic relations order," an order containing certain specific information about the amount to be paid.[34] Before REA, some plan administrators took the position that they could not be

28. Pub. L. No. 98-397, 98 Stat. 1426 (1984) (amending scattered sections of 26, 29 U.S.C.).

29. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of 5, 18, 26, 29, 31 & 42 U.S.C.).

30. ERISA § 205, 29 U.S.C. § 1055 (1982) (amended 1984). A worker had to be offered the chance to provide protection for a spouse. The opportunity to elect survivor protection arose (1) when the worker applied for his own pension, and (2) at the later of the date the worker reached the plan's earliest retirement age or ten years before the plan's normal retirement age.

31. Pub. L. No. 98-397, § 103, 98 Stat. 1426, 1429-33 (1984) (amending ERISA § 205, 29 U.S.C. 1055 (1982)).

32. *Id.* at 1433 (amending ERISA § 205(i), 29 U.S.C. § 1055(i) (1982)).

33. *Id.* at 1430 (amending ERISA § 205(c)(2), 29 U.S.C. § 1055(c)(2) (1982)).

34. *Id.* § 104, 98 Stat. at 1433-36 (amending ERISA § 206(d), 29 U.S.C. § 1056(d) (1982)). The same rights also apply to a married spouse, child, or other dependent of the participant. *Id.*

compelled to obey a court order requiring payment to a worker's former spouse.[35] The new divorce provisions go beyond mere clarification, however, and allow greater flexibility for payment to the former spouse. The qualified order may be written to permit the former spouse to receive her share in any form provided by the plan, such as a lump sum or a monthly annuity payable over her lifetime.[36] The share may be paid as soon as the worker reaches the earliest retirement age under his plan.[37] The order may also allow the former wife to receive widow's pension protection.[38] Previously, plans were not obligated to provide survivor protection to a divorced spouse.[39] The new provision also entitles the divorced wife to receive certain plan information and gives her standing to sue plan officials for pension fund mismanagement.[40] Because REA gives the ex-spouse many rights formerly held only by the worker, it reflects the philosophy that a wife is co-earner of the pension.

B. *Workers*

The discrimination women workers experience in pay, hiring, and leave policies is worsened by their pension plans, because pension plans have traditionally been structured to reward higher paid, long-service, "faithful" employees who work continuously for one employer or in one industry. Because women tend to be paid less on the average than male workers,[41] change jobs

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35. For example, the court in Francis v. United Technology Corp., 458 F. Supp. 84 (N.D. Cal. 1978), stated that the ERISA preemption provision, ERISA § 514, 29 U.S.C. § 1144 (1976), prevented the required division of pension benefits. In Stone v. Stone, 632 F.2d 740 (9th Cir. 1980), however, the court held that pension division did not violate the preemption provision.

36. Pub. L. No. 98-397, § 104, 98 Stat. 1426, 1434 (to be codified at 29 U.S.C. § 1056(d)(3)(D)(i)). The former spouse who elects an annuity may take it in the form of a joint and survivor annuity (with respect to her subsequent spouse) unless her annuity begins before her ex-husband has terminated his employment under the plan. *Id.* (to be codified at 29 U.S.C. § 1056(d)(3)(E)(i)(III)).

37. *Id.* (to be codified at 29 U.S.C. § 1056(d)(3)(E)(i)(I)). Yet the divorced spouse who is to be paid before the former husband has terminated his employment may receive a share based only on the basic pension the employee has earned to date, not including any pension subsidy. *Id.* (to be codified at 29 U.S.C. § 1056(d)(3)(E)(i)(II)).

38. *Id.* (to be codified at 29 U.S.C. § 1056(d)(3)(F)).

39. ERISA § 205(d), 29 U.S.C. § 1055(d) (1982) (amended 1984).

40. Pub. L. No. 98-397, § 104, 98 Stat. 1426, 1435 (1984) (to be codified at 29 U.S.C. § 1056(d)(3)(J)). The former spouse who has a qualified order is given the status of "beneficiary."

41. On the average, women earn 65 cents for each dollar earned by men. Mellor, *Investigating the Differences in Weekly Earnings of Women and Men*, MONTHLY LAB. REV., June 1984, at 17.

frequently, and take several years off to work part-time because of family responsibilities, they are less likely to receive pensions; when they do receive pensions, their benefits are typically smaller than those of men.

Recent legislation has begun to force pension plans to accommodate the work patterns of women employees, and to reflect the view of many workers and women's advocacy groups that pensions are deferred wages rather than management tools. Most pension reform for women workers has occurred in the private pension area, where the most striking inequities existed. The first attempt at reform appeared in the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA).[42] TEFRA's pension provisions have helped employees of small companies become vested more quickly and earn more substantial pensions. Congress enacted these changes mainly to curb abuses committed by medical, legal, and other professional firms who incorporated primarily to use ERISA pension plans as tax shelters, with the overwhelming majority of benefits going to the doctors and lawyers themselves rather than to the medical assistants, secretaries, or other support staff. These so-called top heavy plans must now allow all plan participants to vest completely after three years of service and pay a specified minimum pension benefit, based on a percentage of pay.[43]

The Retirement Equity Act of 1984 includes some modest improvements for women workers, especially those who are young or who become parents. After members of Congress heard testimony about the large number of women in the under-age-twenty-five work force, they enacted a provision requiring plans to give a worker vesting credit for all service after age eighteen, rather than the previous age of twenty-two.[44] Under the typical plan requiring ten years of service to vest, a worker can vest as early as age twenty-eight. Another provision further allows workers to become plan members as early as age twenty-one, rather than twenty-five.[45] A plan must therefore count all of a worker's service after age twenty-one in figuring the amount of her benefit.

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42. Pub. L. No. 97-248, § 240, 96 Stat. 324 (1982).

43. 26 U.S.C. § 416 (1982). Employers may also use an alternative vesting schedule, in which an employee can vest gradually over a six year period—20% after two years, 40% after three, 60% after four, 80% after five, and 100% after 6 or more. *Id.*

44. Pub. L. No. 98-397, § 102(b), 98 Stat. 1426, 1426 (amending ERISA § 203(b)(1)(A), 29 U.S.C. § 1053(b)(1)(A) (1982)).

45. *Id.* § 102(a)(1) (amending ERISA § 202(a)(1)(A)(i), 29 U.S.C. § 1052(a)(1)(A)(i) (1982)).

Other REA provisions make it easier both for short-term workers and new parents, who take several years off the job, to preserve the pension credits they earned before they left.[46] A non-vested worker who takes up to five years off will retain her pension credits when she returns to work.[47] In addition, one year of a break in service taken to care for a child immediately after birth will not be counted in determining the length of the break.[48]

II. THE 99TH CONGRESS—WHAT'S AHEAD

Additional women's pension reform is still needed, and Congress is likely to consider a variety of proposals. Because previous reforms on behalf of workers have not been as far reaching as those for homemakers, Congress will focus attention on workers' pension issues, mainly in the private pension area.

The private pension system will also attract attention as the debate over deficit reduction continues. Employers receive tax deductions for contributions made to pension funds, and pension fund earnings are not taxed while they remain in the fund. The total revenue loss to the United States Treasury for private pension funds for 1985 is estimated to be about $39 billion,[49] representing the largest single category of all federal tax expenditures. This huge tax subsidy will pressure Congress to make private pension plans as fair to workers as possible.

This Section discusses some of the changes likely to be supported by advocates for women's pension reform. The proposed changes will make vesting easier, eliminate or restrict social security integration, permit pension plan portability, and increase pension participation.

A. *Making Vesting Easier*

Under current law, plans are generally permitted to require

46. *Id.* § 102, at 1426-29 (amending ERISA §§ 202(b), 203(b), 29 U.S.C. §§ 1052(b), 1053(b) (1982)).

47. *Id.* § 102, at 1427 (amending ERISA §§ 202(b)(4)(A), 203(b)(3)(D), 29 U.S.C. §§ 1052(b)(4)(A), 1053(b)(3)(D) (1982)).

48. *Id.* § 102, at 1427-29 (amending ERISA §§ 202(b)(5), 203(b)(3), 29 U.S.C. §§ 1052(b)(5), 1053(b)(3) (1982)).

49. Telephone interview with member of Joint Committee on Taxation (Nov. 1, 1985).

ten years of service before a worker may become vested.[50] Yet one study shows that as of January 1983, half of all full-time women workers had been on their current jobs for only 3.7 years.[51]

Employers can save money on pension fund contributions by setting up a plan in which some workers forfeit pensions by failing to meet length of service requirements. To the extent that women are more likely to be the ones who forfeit, they are paying for the pensions of those who eventually collect, most of whom are men.[52] Moreover, both women and men are foregoing higher immediate wages in exchange for employer contributions to the plan.

Proposals to liberalize vesting will probably call for requiring plans to allow workers to vest after five or three years of service.[53] The federal civil service retirement system[54] and several foreign countries already use five-year vesting. Statistics on private sector workers support the need for a shorter period.[55]

B. Eliminating or Restricting Social Security Integration

Social security integration is common among private pension plans. Integration affects about fifty-six percent of workers in the pension plans of medium and large companies.[56] An integrated pension plan accounts for a worker's expected social security benefit in the calculation of the pension benefit. One

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50. ERISA § 203(a)(2), 29 U.S.C. § 1053(a)(2) (1982).

51. Sehgal, *Occupational Mobility and Job Tenure in 1983*, MONTHLY LAB. REV., Oct. 1984, at 18, 19.

52. A 1979 Brandeis University study predicted that 80% of women and 60% of men who changed jobs in the years 1980-82 would forfeit pensions. BRANDEIS UNIVERSITY, PRIVATE PENSION POLICY SIMULATIONS iv (1980) (a Dep't of Labor Study, Division of Research and Evaluation).

53. On May 23, 1985, Rep. Barbara Kennelly introduced the Pension Vesting, Integration, and Portability Act of 1985, H.R. 2622, 99th Cong., 1st Sess. (1985) [hereinafter cited as H.R. 2622]. Sections 1002 and 202 propose to reduce vesting to five years, with certain exceptions for multi-employer pension plans.

54. 5 U.S.C. § 8333(a) (1982).

55. *See supra* note 52.

56. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYEE BENEFITS IN MEDIUM AND LARGE FIRMS 11 (1985). A 1981 study of medium and large defined benefit plans showed that only 15% of collectively bargained plans are integrated; 76% of non-collectively bargained plans are integrated. Bell & Hill, *How Social Security Payments Affect Private Pensions*, MONTHLY LAB. REV., May 1984, at 18, 19. Unfortunately, only half as many women as men belong to collective-bargaining units. Of full-time workers, 5.9 million women and 11.8 million men belong to unions. Dep't of Labor, Bureau of Labor Statistics, EMPLOYMENT AND EARNINGS, Jan. 1985, at 208.

method of integration subtracts from the pension benefit an amount equal to a certain percentage, up to 83⅓% (but most often 50%), of the worker's social security benefit.[57] Another integration method bases the worker's pension only on earnings over a certain amount.[58]

Integration pre-dates ERISA.[59] Employers with pension plans have justified the practice by pointing out that they are paying social security taxes as well as making pension fund contributions. They claim that because the social security benefit formula replaces a greater percentage of wages for the lower income worker, a pension system favoring the higher income worker means that all workers will have about the same percentage of their pre-retirement earnings replaced by their pension plus social security. Even assuming the truth of this replacement rate prediction, however, pension plan sponsors should consider whether lower income workers might not need a greater replacement of wages. Furthermore, in addition to the pension, higher income workers may have additional savings and investments accumulated during their employment.

In practical terms, social security integration diminishes the low-wage earner's pension benefit to a greater extent than the high-income worker's. Because women earn lower wages than men,[60] integration becomes a women's pension issue.

The tragedy for many women is that even though they become pension plan participants and are fortunate enough to vest under their plans, they may nevertheless discover that their vested benefit amounts to little or nothing. The situation of one woman illustrates this point. But for integration, her pension benefit would have been $77 a month at retirement, after ten years of work. The plan, however, subtracted an amount equal to 50% of her social security benefit of $198, or $99. After the $99 was applied against her $77 pension, she was entitled to no pension.[61]

Although women's advocacy groups object to integration in principle and would prefer to see it prohibited, legislative pro-

57. Many large plans base integration only on that part of the social security benefit earned during employment under the plan. Yet employers are entitled to consider all the social security benefit earned up until an employee leaves the plan, even if the benefit also derives from work for other employers. 26 U.S.C. § 401(a)(15) (1982).

58. For example, the plan could consider only a worker's earnings over $13,000. A similar integration method might provide a pension based on one percent of a worker's final average earnings below $13,000, and two percent of earnings over $13,000.

59. Rev. Rul. 71-466, 1971-2 C.B. 187.

60. *See supra* note 41.

61. PENSION RIGHTS CENTER, RETIREMENT INCOME 6 (1979).

posals in this Congress are more likely to merely limit integration. One proposal is that integrated plans be required to provide a minimum pension benefit for participants who would otherwise receive little or nothing from the plan.[62] The pension benefit, under a defined benefit plan, would be figured by multiplying 1.5% of an employee's average pay by the number of years of service up to a maximum of ten years or 15% of pay.[63]

C. *Permitting Pension Plan Portability*

In a typical defined benefit pension plan, a pension benefit payable at age sixty-five remains fixed as of the day a worker leaves the plan. A worker who has a vested benefit of, for example, $100 a month when she leaves the plan at age forty, can count on receiving a benefit worth much less in purchasing power by the time she starts collecting the pension at age sixty-five.[64] Pension portability would allow a worker to increase her pension benefit where the plan does not use a realistic rate of return. Under one proposal, workers who leave their plans after becoming vested could withdraw their benefits in a lump sum[65] solely for the purpose of depositing the amount in an interest-bearing retirement savings account. A worker will increase her pension benefit if she can invest the money at a higher rate of return than that the pension fund receives. This account would resemble an Individual Retirement Account (IRA): the original contributions and earnings would escape taxation until withdrawn at retirement,[66] and a penalty would be imposed for withdrawal before the worker reaches age fifty-nine and one-half.[67] Differences would exist, however, between the IRA and the proposed Portable Pension Account (PPA). Unlike the IRA, which the worker may choose to leave to any beneficiary, funds remaining in the PPA at the worker's death would automatically go to the surviving spouse, unless the spouse had given previous

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62. *See* H.R. 2622, *supra* note 53.

63. *Id.* §§ 104, 204. This formula parallels the one provided for top-heavy plans under TEFRA, Pub. L. No. 97-248, § 240(a), 96 Stat. 324, 514-16 (1982) (codified at 26 U.S.C. § 416(c) (1982)), but yields a smaller benefit.

64. *See* A. MUNNELL, THE ECONOMICS OF PRIVATE PENSIONS 177 (Table 7-3) (1982) (showing purchasing power of $100 vested benefits at age 65 at varying inflation rates and age of job termination).

65. The lump sum would represent the present value of the worker's benefit beginning at normal retirement age. *See* H.R. 2622, *supra* note 53, §§ 104, 204.

66. 26 U.S.C. § 219(a) (1982).

67. *Id.* § 408(f).

written consent for someone else to receive the money. Also, the penalty for withdrawal of funds before age fifty-nine and one-half is likely to be increased, up to one hundred percent in one proposal,[68] in contrast to the IRA's ten percent penalty.

To avoid the immediate wholesale depletion of pension funds, withdrawal from the pension fund, under the proposal, would be limited to benefits with a present value of $7000 or less.[69] The right of portability would apply to vested benefits in both defined benefit and defined contribution plans.

Although both men and women would gain advantages through portability, women would find it especially useful because their pension benefits tend to be smaller.[70] A worker with several small benefits acquired through a series of short-term jobs could consolidate all her small benefits into a single, larger amount with greater investment opportunities.

Finally, plan administrators may welcome the opportunity to relinquish administration of very small pension amounts after a worker has left the job;[71] and small benefits will be even more common if a shorter vesting period becomes a reality.

D. *Increasing Pension Participation*

Although many women would benefit from changes in vesting, integration, and portability, many other women still cannot hope to earn an adequate pension simply because they are not members of pension plans. Only forty-one percent of full-time women workers are members of pension plans, compared to fifty-one percent of men.[72] The 99th Congress may look to improve women's pension participation. The following represent various methods Congress may consider.

1. Encourage or require employers to set up pension plans— Women in particular are flocking to the retail and service sector of the work force, the fastest growing part of the economy. Pension coverage, however, is extremely low in these indus-

68. H.R. 2622, *supra* note 53, §§ 105, 205.

69. *Id.*

70. *See supra* text accompanying note 2.

71. Current law allows plans to contain the option of paying a worker's pension in a lump sum at the time employment terminates, if the present value of the benefits does not exceed $3,500. ERISA § 203, 29 U.S.C.A. 1053 (1985). The proposed portability provision gives only the participant the option of immediately withdrawing benefits of $7,000 or less. H.R. 2622, *supra* note 53, §§ 105, 205.

72. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, MAY 1983 SUPPLEMENT TO THE CURRENT POPULATION SURVEY.

tries. Pensions cover only twenty-five percent of women workers in retail industries and thirty-two percent in service industries. Coverage is better in manufacturing, as high as sixty-three percent, but women fill only a small percentage of these jobs.[73] One reason for the high coverage in manufacturing is that workers are often unionized, and union members have a high rate of pension coverage—seventy-seven percent.[74] Women, however, are usually not union members.[75]

Congress will doubtless consider how an employer without a pension plan can be motivated to establish one. The 1981 President's Commission on Pension Policy report suggested that all employers be required by law to set up plans that would provide at least a minimum benefit for all employees.[76] This Minimum Universal Pension System would cost an employer up to three percent of payroll.[77] Small businesses would receive tax credits for part of their pension contributions.[78]

It is unlikely that the 99th Congress will go so far as legislating mandatory pensions. A tax incentive would be more in keeping with the popular view of the pension system as voluntary. Although ERISA already provides tax incentives for employer pension plans, stronger incentives are evidently needed. One alternative to merely allowing an employer a business deduction for pension contributions, as ERISA does now, would be to establish a temporary tax credit for the employer without a pension plan who sets up a Simplified Employee Plan (SEP). A SEP is really an employer-sponsored IRA used as a pension plan, and is already available to employers.[79] The employer may contribute fifteen percent of a worker's annual earnings, up to a maximum of $30,000 per year, per employee.[80] Current law allows an employer to deduct SEP contributions.[81] One type of tax incentive would be to grant an employer a 125% tax credit for contributions made to a new SEP in the first year. Under this type of incentive, after the first year, the credit would gradually be

73. The coverage rate for women in durable goods manufacturing is 53%. In nondurable goods it is 49%. *Id.*

74. *Id.*

75. *See supra* note 56.

76. FINAL REPORT OF THE PRESIDENT'S COMMISSION ON PENSION POLICY, COMING OF AGE: TOWARD A RETIREMENT INCOME POLICY (1981), *reprinted in The Future of Retirement Programs in America: Hearing Before the House Select Comm. on Aging,* 97th Cong., 1st Sess. 160 (1981).

77. *Id.* at 160.

78. *Id.* at 163.

79. 26 U.S.C. § 408(k) (1982).

80. *Id.* § 219(b)(2)(A).

81. *Id.* § 404(h)(1).

phased out, and eventually the employer would receive only a deduction for amounts actually contributed.

This large tax credit could be justified only if the SEP were not designed to give disproportionately large benefits to higher earning employees, as both SEPs and conventional pension plans are now. One of the reasons an employer would still be attracted to this type of plan, despite the restrictions, is that a SEP requires almost no paperwork and is extremely simple to administer.

In sum, the problem of increasing the number of pension plans is a difficult one to solve. It is hard to predict if and how Congress will deal with it.

2. *Require plans to cover all employees, regardless of job classification*— In general, ERISA requires a plan to cover all employees who are at least age twenty-one, have worked for at least one year, and work 1000 hours a year.[82] But exceptions exist. For instance, an employer need only include a certain percentage of employees or, in the alternative, not discriminate in favor of officers, shareholders, or highly compensated employees.[83] As an example, a plan might specify that all employees are to be considered plan participants, except secretaries. Legally, assuming it meets the above tests, the plan could exclude almost any class of employees, such as all employees with red hair, although exclusions based on job classification are more common.

The justification for allowing some employees to be excluded is not clear. One explanation is that employers may have felt they were being helpful to certain employees, such as law firm associates, who might not remain on the job long enough to be vested. Before 1982, only workers who were not plan participants were permitted to contribute to IRAs.[84] Since then, however, plan participation has not precluded IRA contributions.[85]

Whatever the reason for allowing arbitrary exclusions, women's advocacy groups are concerned that women in support staff positions are the ones being left out. They will ask Congress to require plans to include all employees.

3. *Require plans to include part-time workers*— Plans only have to include workers with 1000 hours of service a year,[86] which is approximately equal to working full-time for six

82. ERISA § 202, 29 U.S.C.A. 1052 (West 1985).
83. 26 U.S.C. § 410(b) (1982).
84. 26 U.S.C. § 219 (1976).
85. *See* The Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 311, 95 Stat. 172, 274-83 (amending 26 U.S.C. § 219 (1976)).
86. ERISA § 202(a)(3)(A), 29 U.S.C. § 1052(a)(3)(A) (1982).

months, forty hours per week, or half-time for one year, twenty hours per week. The part-time work force is disproportionately female.[87] An employer who arranges work schedules can ensure that a part-time worker falls just short of the 1000-hour minimum and thus not earn pension credits. Whether it arises by design or accident, however, the problem of lack of coverage for part-time workers will be accentuated as more women enter the work force and the demand for job-sharing and flexible work hours grows.

One answer: plans could be required to give partial credit for less than 1000 hours of service in a year when the service is performed by an employee who regularly works part-time. A worker with 501 to 999 hours of service in a year would be a plan participant and receive one-half year of credit toward vesting. This one-half year would likewise count toward the number of years used in calculating the pension benefit amount.[88]

4. *Require plans to include all employees, regardless of age*— ERISA permits defined benefit plans to exclude from participation any employee who starts work within five years of the plan's normal retirement age, typically age sixty-five.[89] Practically speaking, this means that any employee who begins employment at age sixty or older will have no chance to earn a pension, even if the employee remains on the job until age seventy or seventy-five.[90]

The argument for the ERISA provision is that pensions for older employees are expensive, because a greater portion of the pension must be paid for through direct employer contributions to the plan. For a younger worker, an employer could provide the same pension with a smaller contribution, knowing that investment earnings over a period of years would make up the rest of the promised pension benefit. Some say that employers will be reluctant to hire older workers if they also have to pay them pensions. Yet this exclusion penalizes the older displaced homemaker who, having lost her husband through death or divorce, must enter the work force late in life. Without the opportunity to earn a pension, she may be compelled by financial circumstances to work the rest of her life. Without a pension, she cannot afford to retire.

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87. Sixty-nine percent of the part-time work force is female. Dep't of Labor, Bureau of Labor Statistics, EMPLOYMENT AND EARNINGS, Jan. 1985, at 162.

88. *See* H.R. 2622, *supra* note 53, §§ 103, 203.

89. ERISA § 202(a)(2)(B), 29 U.S.C. § 1052(a)(2)(B) (1982).

90. Some plans designate an earlier normal retirement age, such as 62 or 60, and could therefore exclude an employee who started work at age 57 or 55.

Federal law contradicts itself by permitting this form of employment discrimination, but otherwise protecting older workers up to age seventy through the Age Discrimination in Employment Act of 1967.[91] Women's groups will urge Congress to remove this exclusion from ERISA. They believe it allows employers to take advantage of older women. So long as employers must refrain from other forms of age discrimination, there is no reason why they should not have to provide pensions on an equal basis.

E. Other Proposed Changes

Although Congress will give most of its attention to making private pension improvements for workers, other women's pension problems will be examined. We can expect to see legislation introduced that would further expand the pension rights of divorced spouses under the military, Foreign Service, and federal civil service retirement systems. For example, Congress will probably consider a bill that would provide military ex-wives the same benefits that Foreign Service ex-wives already have—an automatic pro-rata share of the retirement and survivor benefits.[92] Foreign Service ex-wives, on the other hand, will seek some extension of the 1980 Foreign Service Act for spouses divorced before the law's effective date of February 15, 1981.

Congress will also look at the civil service retirement system. Social security covers federal employees hired since January 1, 1984.[93] A scaled-down civil service retirement system is necessary to supplement social security benefits. It will be helpful to women workers if the new system does not perpetuate the current system's practice of "backloading," by which workers with long service benefit from a formula that gives greater weight to later years of work than earlier ones.[94]

CONCLUSION

Various members of Congress will sponsor versions of the pro-

91. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-634 (1982)).

92. *See supra* text accompanying note 7.

93. Social Security Amendments of 1983, Pub. L. No. 98-21, § 101, 97 Stat. 65, 67 (to be codified at 42 U.S.C. § 410).

94. 5 U.S.C. § 8339(a) (1982).

posals discussed above. Several women's pension measures are part of the Economic Equity Act bill, a package of economic reforms for women.[95] Passage of these provisions will make our retirement systems a more realistic source of income for older women. No longer will a woman be unfairly asked to adjust her life to fit her own or her husband's pension plan.

95. H.R. 2472, 99th Cong., 1st Sess. (1985). This bill includes pension provisions identical to those in H.R. 2622, *supra* note 53.